No. 85-1329 and 85-6207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMINC, NATHAN HELFAND *Petitioners*,

v.

UNITED STATES, *ex rel.* VUITTON ET FILS S.A. *et al.*, *Respondent.*

BARRY DEAN KLAYMINC, *Petitioner*,

v.

UNITED STATES, *ex rel.* VUITTON ET FILS S.A., *et al.*, *Respondent.*

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS

WILLIAM WEININGER
845 Third Avenue
New York, NY 10022
(212) 308-3767
Counsel for Petitioner Sol Klayminc

THOMAS R. MATARAZZO
4009 Fifth Avenue
Brooklyn, NY 11232
(718) 853-4040
Counsel for Petitioner Nathan Helfand

MITCHEL B. CRANER
666 Fifth Avenue
13th Floor
New York, NY 10103
(212) 757-9350
Counsel for Petitioner George Cariste

JAMES A. COHEN
WASHINGTON SQUARE LEGAL SERVICES, INC.
715 Broadway, 4th Floor
New York, NY 10003
(212) 505-7400
Counsel for Petitioner Barry Dean Klayminc

On the Brief:
GAIL HEATHERLY
STUART B. KATZ
JOHN O'HALLORAN
JOHN SIPOS
Legal Interns.

LEONARD J. COMDEN
WASSERMAN, COMDEN & CASSELMAN
5567 Reseda Blvd.
Suite 330
Tarzana, CA 91356
(818) 705-6800
Counsel for Petitioner Gerald Young

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

1. Whether interested private attorneys may, consistent with the due process clause of the Fifth Amendment and Fed. R. Crim. P. 42(b), prosecute criminal contempt proceedings.

2. Whether, pursuant to Fed. R. Crim. P. 42(b), an interested private attorney may direct an unsupervised investigation in order to obtain evidence to be used in a criminal contempt trial.

3. Whether the Court of Appeals erred in affirming criminal contempt sentences of six months to five years.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 780 F.2d 179. The opinions of the district court are reported at 592 F. Supp. 734 (decision on pre-trial motions) and 602 F. Supp. 1052 (decision on post-trial motions).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 16, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 42(b) of the Federal Rules of Criminal Procedure, and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Rule 42(b) states:

> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

1. Introduction

The issues presented by this case are whether either due process or Fed. R. Crim. P. 42(b) permits criminal contempt cases to be prosecuted by an interested attorney and whether that attorney may conduct a special investigative "sting" operation to obtain evidence for such criminal contempt cases.

In 1978, the luggage company Vuitton et Fils S.A., ("Vuitton")[1] mounted an aggressive, multi-faceted campaign to enforce its trademark rights. As part of this campaign, Vuitton instituted over eighty lawsuits in the Southern District of New York and literally hundreds of investigations and legal actions nationwide. J. Joseph Bainton, Esq. ("Bainton"), a partner in the firm of Reboul, MacMurray, Hewitt, Maynard & Kristol ("Reboul MacMurray"), has appeared as attorney of record for Vuitton in virtually all of these proceedings, including the instant prosecution for criminal contempt, which resulted in prison sentences ranging from five years to six months.[2]

---

[1] Vuitton et Fils S.A. and Louis Vuitton S.A. are a single company, called Louis Vuitton ("Vuitton"), which is organized under the laws of the Republic of France. Vuitton has a number of affiliates, none of which are publicly traded. Vuitton has no other related corporate entities required to be set forth pursuant to Rule 28.1 of the Supreme Court Rules. See Respondent's Reply Brief to Petition for Writ of Certiorari n.1.

[2] The sentences of imprisonment were as follows: Sol Klayminc ("Klayminc"), five years; Gerald Young ("Young"), two and one-half years; Barry Klayminc ("Barry"), nine months; George Cariste ("Cariste"), nine months; Nathan Helfand ("Helfand"), six months (J.A. 162-164). All defendants remain at liberty pending appeal. The Order to Show Cause also contained allegations against David Rochman ("Rochman"), Robert Pariseault, Esq. ("Pariseault") and three corporations owned by Klayminc. None of the latter went to trial.

The injunction defendants were convicted of violating is set out in the Appendix to the Petition for a Writ of Certiorari (Pet. App. D-1). The Order to Show Cause (O.S.C.) sets forth the way in which the injunction was violated (Pet. App. E-1).

The litigation strategy developed by Vuitton combined both civil and criminal sanctions. Initially, Vuitton brought a civil action against an alleged trademark infringer, seeking damages and injunctive relief. Apparently, however, Vuitton has encountered difficulties in obtaining compliance with its civil injunctions and in identifying potential civil defendants. By resort to criminal contempt proceedings, Vuitton has sought to address both problems. Bainton, on behalf of Vuitton, has frequently requested and obtained appointments as Special Prosecutor pursuant to Fed. R. Crim. P. 42(b) (J.A. 19).

In this case, Bainton, again appointed Special Prosecutor, was also permitted to direct an elaborate undercover sting operation completely unsupervised by the United States Attorney or by any other disinterested prosecutor. The sting provided the evidence underlying the charge of criminal contempt against defendants.

The appointment of Bainton as Special Prosecutor led to problems of two distinct kinds. One problem was the actual conflicts of interest under which Bainton operated by assuming the dual role of attorney for Vuitton and Special Prosecutor for the United States. These conflicts of interest are most strikingly demonstrated by three independent civil lawsuits: Klayminc's defamation suit against Bainton and Reboul, MacMurray, filed three months before the "sting"; Klayminc's action for discharge in bankruptcy; and a permanent injunction against Young. The injunction against Young was similar to the injunction against Klayminc and enjoined him from, *inter alia*, aiding and abetting activity infringing Vuitton's trademark. (Final Consent Judgment and Permanent Injunction Nov. 13, 1981. (C.D. Cal. 1981)) (L.1). [3]The second problem presented by the appointment of Bainton as Special Prosecutor was the

---

[3] Several items have been lodged for the convenience of the Court in the Office of the Clerk, and will be designated in this brief as "L._____."

reliability of the evidence gathered during the sting.[4] The Special Prosecutor's conflict of interest and lack of training and accountability lessened the quality of the evidence.

2. The Appointment Of A Special Prosecutor.

This criminal contempt action arose from a civil trademark infringement action, *Vuitton et Fils S.A.* v. *Karen Bags, Inc.*, 78 Civ. 5863 (CLB) (1982).[5] In a final settlement, Klayminc, Barry and the family companies agreed to pay $100,000 plus interest, and consented to the entry of a permanent injunction (Pet. App. D-1), which subsequently formed the basis of the criminal contempt proceeding. The injunction, entered on July 30, 1982, proscribed in pertinent part:

> (b) manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297, 594.

(Pet. App. D-2).

[4] This brief raises the issue of the reliability of the evidence, not to argue that the evidence was insufficient, but to demonstrate the substantial risks to defendants' rights and the adverse impact upon the integrity of the justice system when trained and accountable public prosecutors do not participate in the enforcement of the criminal law.

[5] There was an earlier criminal contempt case against Klayminc involving a violation of the temporary injunction. The District Court ordered it to be tried before a magistrate as a petty offense. Although Bainton was again acting as Special Prosecutor on behalf of the Court and the public, he sought a Writ of Mandamus from the Second Circuit Court of Appeals to direct the case to be tried in district court as a serious crime, thus making possible the imposition of more serious sentences (Petition for a Writ of Mandamus, R. 557). The Petition was denied. (References to the Record are designated by "R." The references are to the Second Circuit Appendix and Supplemental Appendix, which have been provided to the Court. Although the Appendix and Supplemental Appendix are paginated "A-[page]" and "[page]-A", respectively, references in this Brief will be to the page number only. Thus, "A-25" and "1234-A" will be cited as "R. 25" and "R. 1234").

The injunction also prohibited aiding and abetting the proscribed activities (Pet. App. A-15). However, the injunction made no mention of a conspiracy to violate its terms.

In early 1983, Vuitton retained Kanner Security Group, Inc., a Florida private investigatory firm, for the purpose of undertaking a sting operation to advance Vuitton's trademark enforcement campaign (J.A. 21). Vuitton and Bainton also hired Mel Weinberg ("Weinberg"), the former confidence man central to ABSCAM, whose skills were crucial to the operation of the Bainton-supervised sting. In due course, Vuitton learned through Weinberg of remarks attributed to Klayminc by defendant Helfand which indicated that Klayminc might be able to provide counterfeit merchandise (J.A. 22).[6] Vuitton also learned that Klayminc had recently acquired an interest in a handbag factory located in the Republic of Haiti (J.A. 22).

On the basis of this information, Bainton filed an affidavit on March 31, 1983, requesting that the District Court for the Southern District of New York appoint him and Robert P. Devlin, then an associate of Reboul, MacMurray, Special Prosecutors pursuant to Fed. R. Crim. P. 42(b). Bainton simultaneously requested permission to undertake certain extraordinary investigative measures because it was unethical for an attorney to surreptitiously record a conversation but no similar prohibition existed against a prosecutor. (J.A. 26). Among the allegations Bainton made was that a "massive international conspiracy" existed to violate the court's injunction (J.A. 25). The Court (Hon. Morris E. Lasker) granted both requests (J.A. 27) and directed, on a related case theory, that the Honorable Charles L. Brieant, the judge assigned to Vuitton trademark litigation, be notified. Judge Brieant instructed Bainton to arrange a "full debriefing of [his] information to the U.S. Attorney." Judge Brieant, relying on Bainton's affidavit,

[6] Helfand alleged that it was Weinberg who first mentioned Klayminc. Letter from James Cohen, Esq. and Thomas R. Matarazzo, Esq. to Hon. Charles L. Brieant, November 28, 1984 (L. 13). In any event, Helfand was encouraged to reestablish his relationship with Klayminc.

characterized the counterfeiting operation as "more serious than the typical violation of the sort which is commonly referred to in this district as the T-shirt cases." (J.A. 62.)

The debriefing was never arranged. Bainton's affidavit and the court Order were forwarded to the United States Attorney, but no member of that office received any further information regarding the nature of the case or the evidence involved. Instead, after a brief telephone conversation, the chief of the criminal division wished Bainton "good luck" (R. 1801).

3. The "Sting."

The only instructions received by Weinberg, who was principally responsible for the day-to-day operation of the sting, were admonitions "not to entrap" anyone and "not to embarrass the government" (R. 2167). Weinberg never read the injunction (R. 2166), and neither the Order nor the meaning of criminal contempt were ever explained to him (R. 2178). He was never told that the activity in which the defendants were allegedly engaged did not violate any criminal statute[7] (R. 2162). From the outset of the sting it was clear that Klayminc was not then engaged in counterfeiting activity. He did not possess any materials needed to produce the counterfeit bags, and indeed nothing was ever manufactured in Haiti. Nonetheless, once Bainton was appointed Special Prosecutor, Weinberg approached Klayminc and proposed a joint venture to produce and sell counterfeit Vuitton bags. The entire project was dependent on Weinberg supplying all the machines, dies, and materials and putting up the capital, as well as buying the finished product.[8]

---

[7] Weinberg also never met with the Special Prosecutor to discuss in detail what was to be accomplished or avoided at meetings with the objects of the sting (R. 2182-83).

[8] For example, Weinberg undertook to provide the money to buy the Vuitton material (J.A. 44); to set Sol up in Haiti (J.A. 49); and to provide working capital (R. 769).

The sting yielded many hours of audio and video tapes of conversations touching on many subjects. On numerous occasions, various defendants expressed the belief that if counterfeit Vuitton merchandise were kept out of the United States, the injunction would not be violated.[9] Weinberg picked up this theme and assured the defendants that their planned activities would not violate the injunction.[10] For example, when Klayminc told Weinberg he would not take the chance of shipping bags to the United States, Weinberg replied that Klayminc could ship to other countries without problems (J.A. 75). Weinberg agreed with the phrase "civil crime" used by Young to describe the proposed venture (J.A. 90), and told Rochman he did not want Klayminc to ship counterfeit bags from Haiti to the United States (R. 1279, 1299). In short, the defendants' understanding about the scope of the injunction was manipulated by Weinberg.[11]

As noted, defendants Young, Cariste and Helfand were not parties to the Klayminc's permanent injunction. Despite investigative efforts to determine the state of their knowledge of the injunction, the taped conversations contain only vague and

---

[9] For example, Klayminc declared he could not get involved in manufacturing in the United States (R. 1007).

[10] The District Court subsequently charged the jury that manufacture, sale or distribution of counterfeit bags outside the United States would not violate the injunction (R. 2820). Judge Brieant later said: "I gave the charge on that to the jury *because I felt required to do so*, notwithstanding case law that indicates it would have been a violation." (R. 2970) (emphasis added).

[11] Typical of these exchanges was a conversation between Weinberg and Klayminc's wife Sylvia Klayminc on April 8, 1983. After Weinberg told her about the plan, he stated that she could soon be selling Vuittons again. Sylvia responded: "No, I won't be able to do it here." Weinberg: "Why?" Sylvia: "Ah, you're not allowed to do it here, I mean, in the United States." Weinberg: "Well, we'll ship to you in Europe, then." When Weinberg indicated that the casinos he represented were in this country, Sylvia protested: "[N]ot in the United States." (J.A. 66). Later in the same conversation, Weinberg said "[w]hat he's got to be careful of . . . anything he brings into the States, that they don't get wise, because they'll be looking for . . . ." Sylvia protested again: "You mean, that stuff? He's not going to . . . ." Weinberg: "No, no. No, no. I'm talking about money." (J.A. 72).

general statements. For example, Weinberg referred in Young's presence to Klayminc's "troubles" and to Klayminc's getting "caught" (R. 1097). Nowhere in the taped conversation is a description of the terms of the injunction.[12] Weinberg mentions without elaboration a "court order" and an "injunction."

4. The Order To Show Cause And The Trial.

The District Court issued an Order to Show Cause for alleged civil and criminal contempt pursuant to Fed. R. Crim. P. 42(b) upon Special Prosecutor Bainton's application.[13]

The O.S.C. alleged and petitioners were convicted of the following:

Klayminc was convicted of offering to sell counterfeit Vuitton bags, counterfeit fabric, and a fifty percent interest in the Haiti factory; and of selling Weinberg twenty-five counterfeit bags and of having agreed to buy counterfeit fabric from Young and Rochman (Pet. App. E-2).

Barry was convicted of representing to Weinberg that he was fully aware of and involved in his father's counterfeiting operations in Haiti and for stating that in the event of his father's untimely demise, he was ready, willing and able to take over the operations (Pet. App. E-3).

Young was convicted of offering to sell counterfeit Louis Vuitton fabric to Klayminc with knowledge of the existence of the injunction (Pet. App. E-4).

---

[12] Rochman testified at trial that Helfand told him Klayminc was "under an injunction now" (R. 2360), and that he relayed this information to Cariste, who he believed was fully aware of Klayminc's problems (R. 2363).

[13] Although counsel for defendants argued that a criminal conviction for violation of the injunction required a completed contemptuous act (R. 91), the court charged that it was sufficient to find that a defendant participated in or did something open, overt, or visible, in furtherance of a violation or a scheme or plan to violate the injunction order (R. 116). Counsel also unsuccessfully urged that a conspiracy to violate the injunction would not constitute a criminal contempt under the terms of the injunction (R. 91, R. 2477).

Helfand was convicted of introducing Weinberg to Klayminc in order to facilitate the sale of counterfeit bags and of aiding and abetting Klayminc by convincing Weinberg to invest in the Haitian operation, both with knowledge of the injunction (Pet. App. E-5).

Caristè was convicted of selling twenty-five counterfeit Vuitton bags and of agreeing to cut and ship pieces to Klayminc for assembly into counterfeit bags with knowledge of the injunction (Pet. App. E-6).

The evidence at trial, which consisted mostly of audio and video tapes produced during the sting, supported the O.S.C.[14]

The civil contempt claim was identical to the criminal contempt allegations and became the subject of a motion for summary judgment shortly after the criminal conviction. This motion was filed on June 20, 1984 by Bainton on behalf of Vuitton seeking $538,991.12 as damages for civil contempt (J.A. 124). This sum includes attorneys' fees of more than $300,000 and expenses billed to Vuitton by Reboul, MacMurray in connection with the Special Prosecutor's investigative and prosecutorial efforts in the criminal case. Neither Rochman nor Pariseault were named in the motion. The summary judgment motion was denied. The civil contempt portion of the case remains open.

5. The Conflicts Of Interest.

Bainton's utilization of evidence from the criminal investigation to improve the positions of himself and Vuitton in three separate civil suits shows how actual conflicts of interest emerged from his dual roles of Special Prosecutor for the United States and private attorney for Vuitton. These suits

---

[14] Rochman was alleged to have offered to sell counterfeit Vuitton fabric to Klayminc (Pet. App. E-6). Both Rochman and Pariseault were alleged to have offered to sell Klayminc and Weinberg one thousand completed counterfeit Vuitton bags and apparatus worth $550,000 to manufacture counterfeit Vuitton bags (Pet. App. E-4, 5).

involving Bainton or Vuitton or both, were related to, but distinct from, the criminal contempt case, and led to confusion regarding which client—the United States or Vuitton—Bainton was serving and when.

In December, 1982, Klayminc stopped making payments on the $100,000 judgment in favor of Vuitton with a balance remaining of over $80,000, and filed a defamation action against Bainton and Reboul, MacMurray.[15] During the sting Weinberg attempted to elicit from Klayminc an admission that the defamation suit was frivolous and that the *Wall Street Journal* article which printed Bainton's statement did not harm his business (J.A. 34).

Weinberg also discussed Klayminc's financial situation, and attempted to find out if Klayminc had assets "stashed away safe that nobody knows" (J.A. 31). On July 18, 1983, Klayminc and his wife filed a joint bankruptcy petition seeking a discharge of their debts pursuant to 11 U.S.C. § 727. Vuitton then filed a complaint objecting to the discharge (J.A. 108). On December 6, 1983, Bainton, on behalf of Vuitton, appeared at an evidentiary hearing before the Bankruptcy Court, and introduced into evidence five tapes created while he was the Special Prosecutor which were also later introduced at the criminal trial.[16]

---

[15] Before the sting began, Klayminc filed the defamation action against Bainton and Reboul, MacMurray in New York State Supreme Court, New York County. The complaint was based on a comment reportedly made "gleefully" by Bainton at a press conference and attributed to him in the *Wall Street Journal*. Bainton said of Klayminc:

> Even if he doesn't get thrown in the hoosegow . . . [h]e was fingerprinted and photographed right next to the muggers and mother-rapers. I'm sure that was an experience he'll remember.

(J.A. 8).

The complaint alleged the statement was false and defamatory and sought recovery for lost business and damage to Klayminc's reputation, totaling $2,250,000. This action, pending during the sting and criminal trial, was voluntarily discontinued (R. 2927).

[16] The tapes were: 1) April 1, 1983—GX (Government Exhibit) 18; 2) April 5, 1983—GX 83; 3) April 13, 1983—GX 104; 4) April 14, 1983—GX 85; and 5) April 14, 1983—GX 106.

The third civil suit involved a permanent injunction and consent decree entered in favor of Vuitton against Young in November 1981 which enjoined, *inter alia*, assisting or aiding and abetting various trademark-infringing activities. It contained a liquidated damages provision of $750,000, the satisfaction of which was permanently stayed unless Young violated the terms of the injunction (Final Consent Judgment and Permanent Injunction, November 13, 1983 (C.D. Cal.) (L. 1)). Subsequently, in August 1985, Bainton, on behalf of Vuitton, attempted to use Young's criminal contempt conviction for its collateral estoppel effect to obtain execution of the $750,000 judgment (*Ex Parte* Application for Order to Show Cause Re Contempt August 7, 1985 C.D. Cal.) (L. 16)).[17]

The conflict in Bainton's dual roles is also demonstrated by the way Vuitton's interest affected the plea bargaining process. On May 7, 1984, in his role as Special Prosecutor, Bainton permitted Rochman to plead guilty to contempt as a petty offense in return for Rochman's promise to testify at the criminal contempt trial (J.A. 103). He also granted Rochman immunity from any future prosecution for "any other known or unknown Vuitton trademark violation" (J.A. 105), and agreed that if the plea agreement was complied with, he would recommend a six month probationary term. Such a sentence was later imposed. On the same day, on behalf of Vuitton, Bainton dismissed all civil claims against Rochman (J.A. 106).[18] Over three months after defendants were convicted, Bainton permitted Pariseault to plead guilty to contempt as a petty offense in exchange for a complete debriefing about the subject matter of the O.S.C. and an agreement to testify truthfully regarding "his conterfeiting [sic] dealings in Vuitton merchandise" at

---

[17] The criminal investigation of Young did not cease when Young declared he had decided not to supply counterfeit material (R. 2284-85).

[18] Bainton, as counsel for Vuitton, also agreed to release all of Vuitton's civil claims against Rochman's wife, Rochman's in-laws, and Rochman's company, Host National Corporation, "in connection with [Rochman's] plea agreement" in the criminal case (J.A. 106).

"any trials or hearings" (Letter from J. Joseph Bainton to John A. O'Neill, Esq. dated September 10, 1984 [plea agreement]) (L. 36). By letter dated September 11, 1984, Bainton, on behalf of Vuitton, agreed with Pariseault to the entry of a permanent injunction and judgment for $15,000 against Pariseault. This money judgment was held in abeyance, interest free, for a period of five years. (Letter from J. Joseph Bainton to John A. O'Neill, Esq. dated September 11, 1984 [Vuitton release]) (L. 39). Although the agreement between Vuitton and Pariseault was brought to the attention of the court during the plea colloquy (L. 46), all parties claimed there was no relationship between it and the guilty plea. At sentencing the Special Prosecutor informed the court that Pariseault had been forthcoming about the subject of the matter of the Order and "other matters as well" (L. 49).

6. The District Court And Second Circuit Decisions.

The district court denied both the pre-trial motion (Pet. App. B-1) and the post-trial motion (Pet. App. C-1) to disqualify the Special Prosecutor on the grounds of both actual conflict of interest and the appearance of such conflict, relying on *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60 (2d Cir. 1981).[19] The court upheld the grant of investigatory authority, holding that the "normal or commonly accepted meaning" of the words "to prosecute" makes it "clear that a special prosecutor's authority under Rule 42 extends beyond simply presenting evidence in court" and includes the authority to investigate (Pet. App. C-16).[20]The court sentenced the defendants to custodial sentences ranging from five years to six

[19] Also denied was a motion for a post-trial hearing on the due process issues, *cf. United States* v. *Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981), seeking to determine, *inter alia*, whether payment of the legal fees billed to Vuitton by the Special Prosecutor might be *de facto* contingent on performance in the criminal proceeding, and whether the Klayminces were improperly targeted.

[20] The District Court's interpretation is puzzling in light of the fact that the words "to prosecute" do not appear anywhere in Rule 42(b).

months, citing "the rights of trademark holders" as the principal interest to be vindicated (J.A. 162). Subsequently, on Bainton's recommendation, defendants Rochman and Pariseault were sentenced to probation.

A divided panel of the Second Circuit affirmed the criminal contempt convictions (Pet. App. A-1). The majority relied on *Musidor* to uphold the appointment of the special prosecutors. The court stated that it was "not persuaded that Bainton and Devlin were disqualified by their past connections with Vuitton's business, their involvement in previous lawsuits with the defendants, or by any of their conduct in this lengthy litigation." (Pet. App. A-11). Describing the defamation action as "clearly frivolous," the court said it was "entitled to no weight" in its consideration of potential conflicts of interest (Pet. App. A-10). Upholding the granting of investigatory authority, the circuit court stated that the term "to prosecute,"[21] as used in Rule 42(b), "clearly encompasses the power to investigate and gather evidence through activities such as the Bagscam sting supervised by Bainton and Devlin." (Pet. App. A-12). The court dismissed the argument that the jury instructions incorrectly permitted defendants' conviction for conspiracy to commit contempt, stating that "Barry has unduly focused on one line of a long charge which accurately and completely informed the jury." (Pet. App. A-13). The court also upheld the sentences imposed by the District Court (Pet. App. A-15).

Circuit Judge Oakes, the author of *Musidor*, dissented. He said that the decision permitting the sting investigation to continue was incorrect (Pet. App. A-23). Noting the "history of bitter litigation" between the parties (Pet. App. A-22), which stretched back to 1978, Judge Oakes outlined the "compelling reasons" against granting investigatory authority to a private attorney:

> [T]he private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics;

[21] Once again, the words simply do not appear in the rule.

> the private lawyer who represents an interested party also lacks the knowledge of legal constraints on the investigatorial process and freedom from bias that a public prosecutor would have.

(Pet. App. A-17).

Judge Oakes also recognized one of the disturbing results of this privately supervised investigation: "My reading of the record indicates . . . that the investigation may have been the proximate cause of the violation." (Pet. App. A-23).

SUMMARY OF THE ARGUMENT

The appointment of an interested private attorney to prosecute a criminal contempt action after conducting a sting investigation into the possible violation of a civil injunction is a violation of a defendant's Fifth Amendment right to due process of law. Furthermore, a criminal contempt punished by a significant prison term is a serious criminal offense, thus entitling the defendants to the full measure of due process rights.

The criminal justice system operates on the premise that a prosecutor is a disinterested party, and thus acts impartially. The existence of a conflict of interest in the prosecutor is inconsistent with the ethical standards by which a prosecuting attorney must be bound and with the prosecutor's obligations to the criminal justice system.

The broad and unreviewable nature of the prosecutor's role is such that reversal is required when a conflict of interest is demonstrated. Reversal is particularly appropriate when the conflict of interest influences the fact-selection process. Here, this interest and lack of training resulted in an investigation which produced unreliable evidence, thus reducing confidence in the ability of the fact-finder to arrive at a just decision. This court can base its decision on the Due Process clause, or use its supervisory power to forbid the appointment of an interested private attorney as special prosecutor in criminal contempts.

Rule 42(b) of the Federal Rules of Criminal Procedure does not grant courts the authority to appoint a private attorney as special prosecutor with complete control of the investigation and prosecution of the case. The text of the rule and its history clearly show that it merely sets out the procedure for dealing with indirect contempts and does not authorize the broad grant of power approved by the Second Circuit. Indeed, such an interpretation violates the doctrine of separation of powers by assuming the power to prosecute criminal offenses vested in the executive branch by Article II of the Constitution.

Furthermore, the sentences imposed on the defendants were excessive and should be overturned.

ARGUMENT

I. DUE PROCESS OF LAW IS VIOLATED BY THE APPOINTMENT OF AN INTERESTED PRIVATE ATTORNEY AS SPECIAL PROSECUTOR OF A SERIOUS CRIMINAL CONTEMPT WITH POWER TO CONDUCT AN UNDERCOVER "STING" OPERATION.

A. Due Process Requires A "Disinterested" Prosecutor.[22]

A cornerstore of the criminal justice system in the United States is the public prosecutor. The public prosecutor's paramount responsibility is to seek justice. *Berger* v. *United States*, 295 U.S. 78, 88 (1935). It is appropriate for a public prosecutor convinced that a defendant's conviction is in the interest of justice to pursue it zealously. However, the prosecutor has only one legitimate interest—that of the public. The injection of other interests necessarily compromises the public interest

---

[22] Judge Friendly suggested the use of the word "disinterested" to describe the situation where the prosecutor does *not* have an interest which constitutes "an additional and impermissible reason in forwarding the prosecution." *Wright* v. *United States*, 732 F.2d 1048, 1056 n.7 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 779 (1985). It is, of course, beyond question that prosecutors have a right to seek conviction of those believed to be guilty. That, however, is not "additional" or "impermissible."

and impairs confidence in the fair and impartial enforcement of the law.

More than any other actor in the criminal justice system, the prosecutor has broad and essentially unreviewable discretion. The prosecutor has discretion to investigate, arrest, prosecute, plea bargain, confer formal and informal immunity, and make recommendations regarding bail and sentencing. Each of these areas has within it wide areas of responsibility providing significant opportunities for the exercise of discretion. Most of these duties are performed outside the courtroom, and are not subject to direct judicial supervision.

The participation of a disinterested, trained and accountable prosecutor provides assurance that the rights of the accused will be respected. "Almost all prosecutions of a serious nature in this country now involve a professional prosecutor. The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions which are not consonant with our traditions of justice." ABA Standards Relating to the Prosecution Function, Standard 2.1, Commentary, p. 49 (Approved Draft 1971). When the "client" of the Special Prosecutor is the United States of America, undivided loyalty requires adherence to the principles upon which the criminal justice system is founded.

> The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

Professional Responsibility: A Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958). *See Berger*, 295 U.S. at 88 (a prosecutor has the "twofold" aim of seeking justice and, for those he believes to be guilty, seeking conviction); *See also Polo*

Fashions v. *Stock Buyers*, 760 F.2d 698 (6th Cir.), *petition for cert. filed* 54 U.S.L.W. 3179 (1985).

The appointment of Vuitton's attorneys, who had vested interests not necessarily coincidental with those of the government, as Special Prosecutors deprived the defendants of a disinterested prosecutor in violation of their due process rights. Both Vuitton and Bainton, as its trademark counsel of long standing, have several direct, personal and pecuniary interests in obtaining convictions of those suspected of violating its trademark.

1. Federal cases.

Disinterestedness in the judicial process has been identified as a fundamental value by this Court. In a wide variety of situations the Court has held that the legal process must be free of partisan influences.[23] In *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980), this Court found that the regional administrator of the Employment Standards Administration of the Department of Labor had powers similar to that of a prosecutor, and was therefore held to a unique standard consistent with his position as public employee. Although the administrator determined violations and assessed fines which were returned to the agency for enforcement purposes, the Court held that the financial incentive to impose large and numerous fines was "too remote and insubstantial" to constitute a bias which violated due process. *Id.* at 243.[24] The administrator did

---

[23] *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (judges); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (administrative boards); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (parole officers); *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980) (defense counsel). *See also Marshall* v. *Jerrico*, 446 U.S. 238 (1980) (standard to which administrative prosecutors are held) *and Berger* v. *United States*, 295 U.S. 78 (1935) (consequences of misconduct by prosecutor).

[24] For discussion of disinterested prosecutors and due process, *see* Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976); Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141 (1986); Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 Mich. L. Rev. 484 (1975).

not stand to benefit financially and the "interests" were entirely governmental.

Lower courts have directly addressed the problem of conflict of interest in prosecutors. In a Sixth Circuit case whose facts are similar to those of the case at bar, *Polo*, 760 F.2d 698 (6th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3179 (1985), the court recognized the serious implications of this dilemma for an attorney:[25]

> It is too much to expect an attorney committed to his client and the client's cause to recognize the "twofold aim" referred to in *Berger* when acting as prosecutor in proceedings which, if successful, can benefit immeasurably that client and his cause. We recognized that federal prosecutors occasionally overlook their twofold obligation and become too concerned with obtaining convictions. However, this overzealousness does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction.

Id. at 705.

Although *Polo* was decided on the basis of the supervisory power, other courts have used a similar analysis to hold that the appointment of an interested private prosecutor violates due process. In *Ganger* v. *Peyton*, 379 F.2d 709 (4th Cir. 1967), the

[25] The importance of the need for prosecutors to avoid conflict of interest and its appearance is reinforced by the Justice Department's standards for United States Attorneys. The United States Attorney's Manual cautions U.S. Attorneys and their assistants not to engage in any activity that "creates or appears to create a conflict of interest . . . ." United States Attorney's Manual, Title 10-2.664 (1984). The manual even cautions attorneys about membership in bar groups, public commissions, and private business organizations because of the potential for an appearance of a conflict of interest. *Id.* at § 10-2.666.

Furthermore, the Manual in § 10-2.660 incorporates the Department of Justice Standards of Conduct, 28 C.F.R. § 45 (1984), which contains very broad restrictions on the permissible activities of employees, so as to avoid any conflict of interest or its appearance. 28 C.F.R. § 45.735-5 (1984).

Fourth Circuit held that a part-time prosecutor who prosecuted a man for assaulting his wife, while simultaneously representing the wife in a divorce action, was laboring under an impermissible conflict of interest which violated due process.

The Fifth Circuit reversed a criminal contempt conviction obtained by an interested private attorney in *Brotherhood of Locomotive Firemen and Enginemen* v. *United States*, 411 F.2d 312, 319 (5th Cir. 1969), on due process grounds. The court said:

> [T]here is no doubt concerning the genesis of this due process deficiency. It flows directly from the fact that the governance of the whole criminal contempt proceeding was delivered into the hands of counsel for private parties, not the National Sovereign. This transcends the matter of competence, character and professional trustworthiness. Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client (footnote omitted). . . . The point is that those conflicting claims of undivided fidelity present subtle influences on the strongest and most noble of men. The system we prize cannot tolerate the unidentifiable influence of such appeals.[26]

Brotherhood, 411 F.2d at 319.

In *United States ex rel. Miller* v. *Myers*, 253 F. Supp. 55 (E.D. Pa. 1966), the court refused to allow a conviction to stand because the defense attorney represented the defendant on a burglary charge and simultaneously, in another matter, the owner of the allegedly burgled establishment. In holding that

[26] In *United States* v. *McKenzie*, 735 F.2d 907 (5th Cir. 1984), *dismissing appeal from In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), the district court appointed disinterested private attorneys to prosecute a criminal contempt after the United States Attorney refused to prosecute. The district court then dismissed the criminal contempt. The Fifth Circuit dismissed the private prosecutors' appeal, holding that they did not represent the United States, and their role as representatives of the district court terminated when the district court dismissed the contempt proceeding. In view of its disposition of the case, the Fifth Circuit did not address the applicability of *Brotherhood*. *McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984).

such a conflict violated the defendant's constitutional right to counsel, the court candidly stated that "[i]t takes no great understanding of human nature to realize that the individuals who had been burglarized might be less than happy and might go so far as to remove the attorney from their good graces if this defendant were acquitted." *Id.* at 57.[27]

Similarly, it is not hard to imagine what might have happened to the relationship between Vuitton and Reboul, MacMurray had Bainton chosen anything other than to seek the harshest possible result. The point, of course, is that this possibility certainly must have occurred to Bainton when making decisions about the scope and direction of the investigation and prosecution.

2. State Cases.

State courts have also ruled that a prosecutor must be disinterested.[28] In *People* v. *Zimmer*, 51 N.Y.2d 390, 414 N.E.2d

[27] The ABA Code of Professional Responsibility has commented on the risk that judgment and loyalty will be compromised:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment of behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

ABA Code of Professional Responsibility EC 5-14 (1978).

[28] Although apparently not all states have addressed this question, only three states allow private attorneys to participate in a public prosecution without the consent or supervision of the district attorney: Alabama, *Hall* v. *State*, 411 So.2d 831 (Ala. Crim. App. 1981); Montana, *State* v. *Cockrell*, 131 Mont. 254, 309 P.2d 316 (1957); and Ohio, *State* v. *Ray*, 102 Ohio App. 395, 143 N.E.2d 484 (1956).

Twenty states allow participation *only* with the district attorney's permission and supervision: California, *People* v. *Powell*, 87 Cal. 348, 25 P. 481 (1891); Colorado, *Davis* v. *People*, 77 Colo. 546, 238 P. 25 (1925); Florida, *Ates* v. *State*, 141 Fla. 502, 194 So. 286 (1940); Georgia, *Allen* v. *State*, 150 Ga. App. 109, 257 S.E.2d 5 (1979); Illinois, *Hayner* v. *People*, 213 Ill. 142, 72 N.E. 792 (1904); Kansas, *State* v. *Berg*, 236 Kan. 562, 694 P.2d 427 (1985); Kentucky, *Stumbo* v. *Seabold*, 704 F.2d 910 (6th Cir. 1983); Louisiana, *State* v. *Hopper*, 251 La. 77, 203 So.2d 222 (1967); New Jersey, *State* v. *Wouters*, 71 N.J. Super.

705, 434 N.Y.S.2d 206 (1980), a conflict arose when a defendant was indicted for defrauding a corporation by a district attorney who was both counsel to and a stockholder in that corporation. The New York Court of Appeals held that the indictment should have been dismissed because the prosecutor's conflict violated ethical standards. The presence of a second client necessarily compromises the duty to pursue justice, even if only by appearance. The Nebraska Supreme Court has said:

> The obligation of an attorney to his client, when once employed in a particular case or matter, can never be shaken off. . . . With this obligation . . . it would be impossible for him to forget his sworn duty to his former client, and there would be a constant inclination to ask . . . "What effect will this evidence, or argument, have upon the rights of my first client, to whom I am still bound by every principle of law and honor? I should be faithful to my trust and protect [my client] in every way possible . . ." We are

479, 177 A.2d 299 (1962); New Mexico, *State* v. *Baca*, 101 N.M. 716, 688 P.2d 34 (1984); North Carolina, *State* v. *Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984); North Dakota, *State* v. *Kent*, 4 N.D. 577, 62 N.W. 631 (1895); Oklahoma, *Ryals* v. *State*, 434 P.2d 488 (Okla. Crim. App. 1967); South Carolina, *State* v. *Addis*, 257 S.C. 482, 186 S.E.2d 415 (1972); South Dakota, *State* v. *Basham*, 84 S.D. 250, 170 N.W.2d 238 (1969); Texas, *Ballard* v. *State*, 519 S.W.2d 426 (Tex. Crim. App. 1975); Utah, *People* v. *Tidwell*, 4 Utah 506, 12 P. 61 (1886); Virginia, *Cantrell* v. *Commonwealth*, 229 Va. 387, 329 S.E.2d 22 (1985); West Virginia, *State ex rel. Koppers Co.* v. *International Union of Oil, Chemical & Atomic Workers*, 298 S.E.2d 827 (W. Va. 1982); and Pennsylvania, *Commonwealth* v. *Musto*, 348 Pa. 300, 35 A.2d 307 (1944).

Six states do not allow more than minimal participation by private attorneys: Massachusetts, *Commonwealth* v. *Gibbs*, 70 Mass. (4 Gray) 146 (1855); Michigan, *Meister* v. *People*, 31 Mich. 99 (1875); Missouri, *State* v. *Harrington*, 534 S.W.2d 44 (Mo. 1976); Nebraska, *Flege* v. *State*, 93 Neb. 610, 142 N.W. 276 (1913); New York, *People* v. *Vlasto*, 78 Misc.2d 419, 355 N.Y.S.2d 983 (1974); and Wisconsin, *Biemel* v. *State*, 71 Wis. 444, 37 N.W. 244 (1888).

Four states have not stated the amount of assistance by a private prosecutor which is permissible: Indiana, *Smith* v. *State*, 426 N.E.2d 364 (Ind. 1981); Mississippi, *Goldsby* v. *State*, 240 Miss. 647, 123 So.2d 429 (1960), *cert. denied*, 365 U.S. 861 (1961); New Hampshire, *State* v. *Hale*, 85 N.H. 403, 160 A. 95 (1932); and Washington, *State* v. *Hoshor*, 26 Wash. 643, 67 P. 386 (1901).

For a summary of state law on this subject, *see* Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141 (1986).

forced to the conclusion that no honest and conscientious attorney could be able, nor should he, if he could, withstand such an appeal.

Flege v. *State*, 93 Neb. 610, 614, 142 N.W. 276, 278 (1913).

The Supreme Court of Wisconsin has also observed that a case is likely to be prosecuted unfairly "if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction." *Biemel* v. *State*, 71 Wis. 444, 446, 37 N.W. 244, 247 (1888). *See also Meister* v. *People*, 31 Mich. 99 (1875) (criminal prosecution should not be entrusted to those who may be tempted to use it for private ends); *State* v. *Kent*, 4 N.D. 577, 62 N.W. 631 (1895) (public control safeguards against overzealous prosecution by private persons).

These and other cases which prohibit participation by an interested prosecutor demonstrate that the duty a prosecutor owes to justice cannot be reconciled with concurrent representation of another client.[29]

There is ample evidence in this case of direct, personal and pecuniary interests on the part of the Special Prosecutor arising out of his continuing role as advocate for Vuitton in contemporaneous civil proceedings, thereby compromising the crucial duty of undivided loyalty owed to the United States, his other "client." By virtue of his appointment as Special Prosecutor, Bainton had the benefit of various investigative privileges nor-

[29] There is another line of cases in which prosecutors have been compromised not by a second client but by a different additional and impermissible interest. In *Wright* v. *United States*, 732 F.2d 1048 (2d Cir. 1984), the Assistant United States Attorney whose only involvement was the grand jury presentation was married to a woman who had a long-running adversarial relationship with the person indicted. This was found to have created a conflict of roles which was the "additional and impermissible reason" compromising the prosecutor's duty to seek justice. *See also Midway Manufacturing Co.* v. *Kruckenberg*, 779 F.2d 624 (11th Cir. 1986), (partner in special prosecutor's law firm may have had business relationship with criminal contempt defendant) (remanded for hearing).

mally reserved for the Justice Department. He then proceeded to use this extraordinary investigative authority to pursue Vuitton's private interests. Although the court authorized surveillance activities to determine whether the injunction was being violated, the actual investigation ran as far afield as the merits of Klayminc's anticipated discharge in bankruptcy, the location of his assets and the defamation suit (J.A. 31, 34, 108). Indeed, the "government's" surveillance tapes were actually used by Bainton, months before the criminal trial, to promote Vuitton's pecuniary fortunes in the Florida bankruptcy proceedings.

Vuitton also had a strong monetary interest in obtaining a criminal conviction in this case because of the permanent injunction against defendant Young. If Young were convicted of violating this injunction, Vuitton would collect damages of $750,000. It is therefore not surprising that the charges against him were pursued even though he had attempted to withdraw from the venture (R. 2284-85).

Another conflict of interest is demonstrated by Bainton and his law firm's status—throughout the relevant period—as defendants in a defamation action brought by Klayminc *before* the sting began (Pet. App. B-5). A conviction of Klayminc for criminal contempt certainly would have limited any possible recovery in the defamation action, which may have contributed to the suit's dismissal.

In addition to all of the foregoing there was a bitter relationship between Bainton, Vuitton and Klayminc and Young by virtue of extensive prior litigation. This demonstrates that Bainton's bias was toward particular individuals, thereby bringing this case within the scope of this Court's reservation in *Marshall:* "In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." *Marshall*, 446 U.S. at 250, n.12.

B. Prosecution Of A Serious Crime By An Interested Attorney Violates Due Process.

In a variety of contexts, the entitlement to constitutional rights varies directly with the severity of the consequences. Due process rights increase as the consequences to the individual of governmental action become more serious. *Baldwin* v. *N.Y.*, 399 U.S. 66 (1970) (trial by jury required for serious offenses); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) (right to counsel when defendant faces imprisonment); *see also* Speedy Trial Act § 101, 18 U.S.C. § 3172(2) (1985) (statutory right to speedy trial applies only to serious offenses).

This Court has held that a defendant charged with a serious criminal contempt, as are defendants here, is entitled to the utmost in procedural protections. *Bloom* v. *Illinois*, 391 U.S. 194 (1968) (right to jury trial in serious contempts). *Bloom* also held that when a defendant is convicted of criminal contempt, which has no maximum punishment, it is the sentence imposed which determines whether the offense is petty or serious. *Id.* at 211. Since defendants here were sentenced to significant prison terms, all were convicted of serious criminal contempts.[30]

In *Polo Fashions*, 760 F.2d 698 (6th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3179 (1985) although it based its decision on supervisory power, the court stated that a disinterested prosecutor is one of the procedural protections which must be afforded to a defendant facing serious criminal punishment in a contempt action, relying on *Bloom* v. *Illinois*, 391 U.S. 194 (1968). *Polo*, 760 F.2d at 704. The defendant in *Musidor, B.V.* v. *Great American Screen*, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982), the only modern authority for the appointment of an interested prosecutor, was sentenced to 60 days in prison. *Musidor*, 658 F.2d at 66.

[30] A criminal contempt is serious if the sentence is for more than six months. *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966). Petitioner Helfand was sentenced to six months, however the district court treated these offenses from beginning to end as serious criminal contempts. All defendants were tried together and provided with all the due process protections available to defendants charged with any serious crime, except the Sixth Amendment right to indictment by a grand jury (an issue which has not yet been decided by this Court), a statutorily proscribed maximum sentence, and, under the Second Circuit decision, a disinterested prosecutor.

1. The Criminal Justice System Is Founded On The Assumption That Prosecutors Are Disinterested.

In the United States, the requirement of fundamental fairness imposed by due process is maintained by a complex system of procedural and substantive rules enforced by, among others, trained and accountable public prosecutors.[31] The system's rules, whether stemming from the Constitution, statutes or court decisions, have been developed implicitly or explicitly with confidence that the public prosecutor has only one client: the public interest. A ruling by this Court affirming the Second Circuit's decision would require reconsideration of the rules and procedures which have been developing for over two hundred years.

For example, in sharp contrast to civil practice, a prosecutor is obligated to provide defense counsel with exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The determination before trial of what is material and exculpatory is necessarily left to the prosecutor and courts rely on public prosecutors to exercise their broad discretion responsibly. A departure from the presumption that the prosecutor acts with no motives but those consistent with the duty to seek justice could require either that the judge examine the documents prior to trial, clearly a burdensome task, or that the prosecutor produce every piece of evidence whether exculpatory or not. Confidence that the prosecutor will exercise judgment responsibly is not possible when there is the presence of a client's interest in addition to that of doing justice. *See also United*

[31] The choice was made very early in our history to abandon the English system of private prosecution as a reaction to problems of harassment, bribery and collusion. Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976).

States v. *Valenzuela-Bernal*, 458 U.S. 858 (1982) (prosecutor has discretion to determine whether illegal aliens may be deported or must be kept in United States to testify at trial).

2. Alternatives Exist To Prosecution By An Interested Private Attorney.

There are other less objectionable alternatives to appointing an interested private attorney to prosecute a criminal contempt. First, criminal contempts may be referred to the United States Attorney's Office. If the case involved, as alleged here, a "massive international conspiracy" (J.A. 25), it is unlikely that the government would decline to prosecute.[32] If there were a shortage of assistants, the U.S. Attorney could appoint a disinterested private attorney to prosecute the case, as is authorized by 28 C.F.R. § 45.735-3(c) and 28 U.S.C. § 543, and recommended by ABA Standards Relating To The Prosecution Function, Standard 2.4 (Approved Draft 1971).

In any event, the United States Attorney was never asked to assume responsibility for this case (R. 1801). At most, the record shows that the United States Attorney did not, of his own initiative, choose to intervene in what was essentially a *fait accompli* between a federal judge and a private party. There is a world of difference between "refusing" to prosecute because of low priority or limited resources and declining to supplant the efforts of a well-heeled party who has already invested substantial resources and obtained a special judicial appointment. While the record contains no explanation of Vuitton's

---

[32] "In the great majority of [criminal contempt] cases, the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance of the court's request to prosecute a mere formality." United States Attorney's Manual, Title 9-39.318 (1977).

In addition, the law has changed since the permanent injunction in this case was entered, such that a criminal contempt action would not be necessary to impose criminal sanctions on trademark infringers. The Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, §§ 1501-1503, 98 Stat. 2178 (codified at 15 U.S.C.A. §§ 1116-1118, 18 U.S.C.A. § 2320 (West Supp. 1985)), makes trafficking in counterfeit goods a federal crime.

failure to initially request the assistance of the Justice Department, whose prosecuting attorneys are "charged with wider responsibilities" than are retained counsel, *United States ex rel. Vuitton et Fils. S.A.* v. *McNally*, 519 F. Supp. 185, 186 (E.D.N.Y. 1981), there is every reason to believe that the United States Attorney would have taken a far different approach to the case than was taken by the Vuitton attorneys. *See* Remarks of Rudolph Giuliani, United States Attorney, Southern District of New York, on "60 Minutes," Vol. XVII, No. 6 (CBS News) (broadcast Oct. 21, 1984) (R. 149.)

Finally, even if the public prosecutor were to prove unequal to the task of prosecuting serious criminal contempt charges, it does not follow from Rule 42(b) that a court must select the alternative which most gravely interferes with the defendant's right to a disinterested prosecutor. The *Polo* court suggested the appointment of a disinterested private attorney. *Polo*, 760 F.2d at 705. The appointment of *pro bono* counsel from established law firms, *see e.g.* United States District Court, S.D.N.Y., *Procedures Regarding Appointment Of Attorneys In "Pro Se" Civil Actions* (Sept. 21, 1983) (R. 419), would be both practical and consistent with the public interest objectives of *pro bono* service. After all, the interests to be vindicated are not Vuitton's, but those of the court and the public. Such counsel would exercise judgment on behalf of the court, free from the compromising influences of private interests, and prevent any appearance of impropriety.

C. An Interested Private Attorney Appointed As Special Prosecutor Should Not Be Given The Power To Conduct A "Sting" Operation.

1. A Private Attorney Appointed To Conduct A Sting Operation Lacks The Training And Accountability To Run Such A Complicated And Controversial Investigation.

The Second Circuit approved a sting operation conducted by an attorney who is untrained and inexperienced as a criminal investigator and accountable to no one but his own conscience

and his private client who foots the bill. The special prosecutor in this case had no experience or training in the conduct of complex and controversial "sting" operations. This controversial investigative technique is subject to close supervision according to strict guidelines even when engaged in by Justice Department investigators. *See* Attorney General's Guidelines on FBI Undercover Operations, (January 5, 1981) (R. 399). In the wake of ABSCAM, the Justice Department's internal safeguards have been described as critical to ensure the reliability of evidence developed through "sting" investigations. *FBI OVERSIGHT: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 96th Cong., 1st Sess. 138-41 (1980) (statement of Phillip B. Heymann, Asst. Atty. General, Criminal Division, Department of Justice). *See also* ABA Standards Relating to the Prosecution Function, Standards 2.3-2.6, Commentary (Approved Draft 1971) (importance of training for prosecutors). The Special Prosecutor's investigation operated without the benefit of internal or external controls.

Even if an interested private attorney may be appointed as special prosecutor, he should not be given the power to conduct "sting" operations for two reasons. First, the conduct of a complex "sting" operation requires well-trained and accountable investigators, which Weinberg and Bainton certainly were not. Second, the granting of broad investigatory powers to an individual who represents both a private client and the government exerts a strain on the principle of confidentiality which governs the conduct of a criminal investigation.[33]

Beyond warnings "not to entrap anyone" and not to "embarrass the government," Weinberg was given no instructions concerning the methodology of the investigation (R. 2167).

---

[33] The Special Prosecutor's actions make tangible the concern that "misuse [of government investigatory powers] would unfairly harass citizens, give unfair advantage to the lawyer's private practice clients and law firm, and impair public willingness to accept the legitimate use of those powers." C. Wolfram, *Modern Legal Ethics* 460 (1986).

Furthermore, a public prosecutor is responsible to the judge insofar as conduct within the courtroom is concerned, but he is also accountable to superiors within the United States Attorney's office and the Justice Department. Bainton, having been appointed by a judge, was obviously not part of such a hierarchy and thus, with respect to conduct outside of court, accountable to no one. The importance of this hierarchical structure to the fair enforcement of the law is demonstrated by the oversight procedures established by the United States Attorney's Manual.

> Judge Oakes summed up the risks when he said:
>
> Those attorneys will frequently lack knowledge of all the limits that our laws require prosecutors to observe. Through inclination and ignorance, as well as lack of responsibility to the public, to higher authorities or to an electorate, or a combination of these, private attorneys are likely to fail to exhibit the self-restraint in conducting an investigation and the candor in admitting errors that are required of prosecutors and are of critical importance if our system is to work properly.

(Pet. App. A-22).

He therefore concluded that a sting should not be approved unless there is no other way of proving the violation of the court order and the proof is strong that the violation has already begun (Pet App. A-17).

D. Reversal Of A Criminal Conviction is Required When A Prosecutor Possesses An Actual Conflict Of Interest.

A prosecutor should be disqualified from any action in which there is an actual conflict of interest. The potential for injustice which arises when there is an interested prosecutor is similar to that which results when a judge has a conflict of interest. Even though the prosecutor may claim that other interests have not affected the performance of his or her duties, the appearance of a conflict requires disqualification of a prosecutor because of the negative effect on the public's perception of the integrity of the criminal justice system.

The role of judge and the prosecutor have certain common elements. At a minimum they share the goal of achieving justice. This common goal is revealed in the process that a case goes through from start to finish. Once the trial begins, however, the duty to determine the fate of the defendant passes to the judge. In that forum, it is the prosecutor's duty to act as an advocate. The common goal which judges and prosecutors share justifies using the same standard for prosecutors that has always been applied to judges.

Disqualification of a judge is required when there is a "direct, personal, substantial, pecuniary interest in the matter before the court. *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). A judge is not permitted "to try cases in which he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). Although the particular level or type of interest has not been defined with precision, there is no requirement of proof that the interest actually altered the judge's decision. *Id.* at 136. Rather, the focus is on the character of the interest, and the "possible temptation" which could lead the judge "not to hold the balance nice, clear and true between the State and the accused." *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

In addition to concern about the public's perception of and confidence in the justice system, the primary reason for this strict standard is the practical impossibility of proving that the interest caused or contributed to the result. "[T]he practical impossibility of establishing that [a prosecutorial conflict of interest] has worked to the defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *Wright*, 732 F.2d 1048, 1056 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 779 (1985) (quoting *People* v. *Zimmer*, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 208 (1980)); *see also People* v. *McDonald*, 196 N.Y.L.J. 13, July 18, 1986 at 1, col. 6 (N.Y. Ct. App., July 3, 1986). In state cases in which the public prosecutor has been forbidden from participating in a civil trial because of a pending criminal action, the courts have not looked for proof of prejudice, but instead have said that they must avoid even the possibility of prejudice or appearance of a conflict. *See e.g.*, *State* v. *Burns*, 322 S.W.2d 736 (Mo. 1959); *State* v. *Jensen*, 178 Iowa 1098, 160 N.W. 832 (1917).

It is neither desirable nor practical to intrude into a judge's decision making process. Similarly, the nature of certain prosecutorial decisions make them quasi-judicial in part because they are not reviewable by any court. The public prosecutor exercises the power to decide whether, how and who to investigate, who to charge and with what, and whether to plea bargain or immunize. These decisions are all as a practical matter beyond the review of a judge. It is impossible to determine how any outside interests have influenced the prosecutor's discretion, much less whether the defendant has been prejudiced in any way. The exercise of the discretionary functions of the prosecutor will normally influence, however subtly, the creation or selection of facts. This is particularly true of stings and is amply demonstrated here. As at result, the way in which improper interests impacted can never be measured. Furthermore, in order to maintain the integrity of the system, "justice must satisfy the appearance of justice." *Murchison*, 349 U.S. at 136.

1. Defendants Have Suffered Actual Prejudice.

However, even if the existence of a conflict of interest or the appearance of such a conflict in the prosecutor is not enough to require reversal, this conviction should be reversed because defendants have suffered actual prejudice by the violation of their due process rights. This can be seen through an examination of the transcripts of conversations which were a result of the "sting" operation.

First, the unreliability of the evidence gathered was prejudicial to defendants. Ambiguity in evidence is one element of due process violations prejudicial to the defendant. *United States* v. *Myers*, 527 F. Supp. 1206, 1229-30 (E.D.N.Y. 1981).

Ambiguities in the transcript may mislead the fact-finder.[34] Ambiguity was one significant risk peculiar to sting operations cited by *FBI UNDERCOVER OPERATIONS: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 97th Cong. 2d Sess. 39-124 (1982). Weinberg on numerous occasions led the defendants to believe that their conduct would not violate the injunction (J.A. 52, 59, 65, 70, 72, 74, 75, 90, 91, 97, 98).

Second, a question which has persisted throughout this case is the extent to which the defendants were persuaded or encouraged by agents of the "government" to do what they might otherwise not have done (R. 288, 314, 769). Contrary to what Vuitton's attorneys had the court believe when the application was made for appointment as special prosecutor, no acts in violation were committed or contemplated prior to Weinberg's contact with the Klaymincs. The "massive international conspiracy" (J.A. 25) turned out to be an inchoate plan to purchase a factory in Haiti, for which the Klaymincs lacked any of the necessary materials or capital without the promised support of Weinberg. Even if there were a conspiracy to produce such bags, the injunction by its terms did not prohibit conspiracy to sell or manufacture Vuitton bags (Pet. App. D-1), and only twenty-five such bags were delivered three days after the sting began. "My reading of the record indicates . . . that the defendants here had probably not violated the earlier order . . . and the investigation may have been the proximate cause of the violation." (Pet. App. A-23.) (Oakes, J., dissenting). It is highly doubtful that any violation would have taken place had it not been for Vuitton's and Bainton's extraordinary efforts to put the defendants in prison.

---

[34] Defendants' motion for a post-trial hearing on due process issues pursuant to *United States* v. *Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981) was denied.

2. Confidential Information Obtained In A Criminal Investigation May Not Be Used As Evidence In A Civil Action.

It is well-settled that a civil litigant—even the Justice Department's Civil Division—cannot enlist the aid of a government criminal investigation to develop evidence helpful to the prosecution of its civil claims. *See United States* v. *Sells Engineering*, 463 U.S. 418 (1983); *see also* Fed. R. Crim. P. 6. Such restrictions have been imposed because

> [g]overnment lawyers and law offices have available a terrible array of coercive methods to obtain information—grand jury, police investigation and interrogation, warrants, informers, and agents whose activities are immunized, authorized, wiretapping, civil investigatory demands, enhanced subpoena power, and the rest.

Wolfram, p. 460.

Civil litigants are not entitled to the fruits of some types of government investigations through ordinary channels of civil discovery. *See, e.g., In re United States*, 565 F.2d 19, 22-23 (2d Cir. 1977), *cert. denied sub nom. Bell* v. *Socialist Workers Party*, 436 U.S. 962 (1978) (government informer's privilege); *Frankel* v. *SEC*, 460 F.2d 813, 817-18 (2d Cir. 1972) *cert. denied*, 409 U.S. 889 (1972) (investigatory files privilege). Indeed, the risk of informal disclosure of such information requires the disqualification of former government attorneys who seek to represent parties in matters related to their official responsibilities. *See General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974). *Cf. Model Code of Professional Responsibility*, DR 9-101(B) (1979).

Bainton admitted in his affidavit seeking to be appointed special prosecutor that the methods of investigation that he proposed were ethically off limits to ordinary lawyers. (J.A. 26). *See* ABA Commission on Ethics and Professional Responsibility, Formal Op. 337 (1974). Despite his knowledge of the unique grant of authority permitting him to record con-

versations, he could not resist using them in the Florida action in his capacity as Vuitton's attorney before the criminal contempt trial.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PROHIBIT THE APPOINTMENT OF AN INTERESTED PRIVATE ATTORNEY AS A SPECIAL PROSECUTOR.

The use of the supervisory power is uniquely appropriate because the offense of criminal contempt shares with the supervisory power the purpose of preserving the integrity and dignity of the court. As Judge Oakes said in his dissenting opinion, "Respect for the court, the end goal of contempt, may be diminished when a court approves an open-ended investigation by attorneys unrestrained by either institutional guidelines or the court's own specific guidance." (Pet. App. A-21.) (Oakes, J., dissenting).

This Court has endorsed the use of supervisory power to deal with conflicts of interest, *Cuyler* v. *Sullivan*, 446 U.S. 335, 346 n.10 (1980), and the Sixth Circuit applied the supervisory power to the problem of private attorneys acting as public prosecutors. *See Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F.2d 698, 704 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3179 (1985). It is therefore appropriate that the supervisory power be used to provide at least a modicum of judicial control over investigative and prosecutorial abuses. "Authorizing the nearly-outrageous and barely legal can hardley be said in the long run to preserve the dignity of the courts or secure their position of respect." Pet. App. A-23 (Oakes, J., dissenting).

III. NEITHER THE TERMS NOR THE HISTORY OF FED. R. CRIM. P. 42(b) AUTHORIZE THE PROSECUTION OR INVESTIGATION OF A CRIMINAL CONTEMPT BY A PRIVATE ATTORNEY.

A. Reliance On Rule 42(b) To Support Appointment Of Civil Plaintiff's Counsel To Prosecute Criminal Contempt Is Unwarranted.

The Second Circuit relied on Fed. R. Crim. P. 42(b) to authorize the practice of appointing an interested private

attorney to prosecute a criminal contempt. Rule 42(b) simply sets out the procedural framework for criminal contempts not committed in the court's presence. Nothing in the text of the rule indicates that the person who gives notice is also permitted to prosecute.[35] Furthermore such an interpretation would permit the judge to give notice, prosecute, be the judge of the law and fact-finder, in the absence of a jury trial. Although wearing so many hats is permitted under very limited circumstances, see Rule 42(a), *Taylor* v. *Hayes*, 418 U.S. 488 (1974); *United States* v. *Lumumba*, 741 F.2d 12, 16 (2d Cir. 1984) and for very special reasons, *see* Dorsen & Friedman, *Disorder in the Court* (1973); permitting it for indirect contempts would clearly violate our most fundamental notions of fairness.

The Notes of the Advisory Committee on the Rules confirm this interpretation:

> The requirement in the second sentence that the notice describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in *McCann* v. *New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935).

Fed. R. Crim. P. 42(b) advisory committee's note.

In *United States* v. *United Mine Workers of America*, 330 U.S. 258 (1946) this court found that Rule 42(b) "was designed to insure a realization by contemnors that a prosecution for criminal contempt is contemplated." *Id.* at 298, and that "[t]he rule in this respect follows the suggestion made in *McCann*." *Id.* at 298 n.66.

---

[35] The first sentence of Rule 42(b) provides that a criminal contempt "shall be prosecuted on notice." The second sentence specifies the content of the notice, and the third details how the notice shall be given. Notice is provided in one of three ways: (1) orally by the judge in open court, in the presence of the defendant; (2) by an order to show cause; or (3) by an order of arrest. The latter two provisions may be brought to bear upon application of either the United States Attorney or a court appointed attorney.

Since the advisory committee relied on *McCann* and the Second Circuit's erroneous interpretation of Rule 42(b) is based on *McCann*, a brief examination of *McCann* and the law of contempt at the time of *McCann* is necessary.

B. Notions Of Contempt Have Undergone Dramatic Changes In The Last 50 Years Thus Rendering McCann Inapplicable.

In the early twentieth century, contempt was thought to be *sui generis*, i.e., neither civil nor criminal, but containing elements of both. *Meyers* v. *United States*, 264 U.S. 95 (1924). As a result, courts struggled to articulate the difference between the two and the procedures applicable to each.

This process was not without confusion, much of it in fact caused by *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 417 (1911), which held that the way to distinguish between civil and criminal contempt was to examine the character of the proceeding and the purpose of the result. *Id.* at 441. In terms of the proceeding's character, no single detail was said to be controlling, and if the purpose of the sanction was to vindicate the authority of the court, it was punitive and therefore criminal; if the purpose was "remedial, oriented toward coercing the defendant to do what he had refused to do" it was civil contempt. *Id.* at 441-42.

In addition to requiring a complex analysis of several factors, this test had the disadvantage of being backward-looking. The characterization of the proceeding depended heavily on the purpose of the sanction which, of course, could not be known until the end of the case. Additional problems occurred because once the sanction was determined to be criminal, rudimentary due process required that notice of the criminal nature of the action be given clearly and up front.[36] Since notice of an action's

[36] This was particularly important because many contempts at that time arose out of civil actions. *See generally*, C. Thomas, *Problems of Contempt of Court* (1934).

character could, theoretically, be given simply and clearly at the outset, to do so was preferable to the *Gompers* test. Proof of notice that the contempt was criminal began to be the critical element.

Unfortunately, the ease and simplicity of the concept proved suprisingly difficult to apply. In *In re Kahn*, 204 F. 581 (2d Cir. 1913), the Second Circuit held that the affiliation of the plaintiff's attorney would give sufficient notice to the defendant of whether the contempt was civil or criminal. In 1935, Judge Learned Hand rejected the *Kahn* test despite recognizing its simplicity because he could not reconcile it with *Gompers*, which required consideration of several factors. *In re Guzzardi*, 74 F.2d 621 (2d Cir. 1935). Less than eleven months later, Judge Hand rejected *Guzzardi* in *McCann* and adopted a notice procedure which became the basis of Rule 42(b). *See* Note, *Civil and Criminal Contempt of Court*, 46 Yale L.J. 326 (1936).

Additional considerations argue against the application of *McCann* to support the appointment of private attorneys as special prosecutors. The present-day understanding of criminal contempts differs significantly from the understanding of contempts that was prevalent in the early twentieth century. Moreover, the Supreme Court in the fifty years following *McCann* has extended important constitutional protections to criminal contempt defendants. As a result of these changes, reliance upon *McCann* for anything beyond a procedure for providing notice is incorrect.

The law of criminal contempt has undergone several fundamental changes since the era in which *McCann* was decided. As noted, during most of the Constitution's history, criminal contempt was regarded as *sui generis;* it was neither a civil nor criminal proceeding. *Meyers*, 264 U.S. at 104-5. Not until 1968 was it established definitively that "criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punished by fine or imprisonment or both." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968).

The notion of the court's power to summarily punish contempt refers to a special type of proceeding where the judge assumes the roles of accuser, prosecutor, jury, and judge to determine whether a violation of the court's authority has occurred. At the time of *McCann* courts enjoyed broad powers to punish summarily both out of court as well as in court contempt where such conduct had the "direct tendency to prevent and obstruct the discharge of judicial duty." *Toledo Newspaper* v. *United States*, 247 U.S. 402 (1918)[37]; *see also Craig* v. *Hecht*, 263 U.S. 255 (1923) (published letter criticizing a district court judge found to be contemptuous). *McCann* itself recognized that courts possessed broad powers to punish summarily both indirect and direct criminal contempts. *McCann*, 80 F.2d at 213. Furthermore, *McCann's* discussion of notice and the power to appoint attorneys assumes the court's broad power to punish summarily direct and indirect criminal contempts existing at that time. *Id.* at 214.

In the case of indirect criminal contempts the only barrier preventing the court from immediately adjudging the defendant's guilt was the contemnor's right to notice and an opportunity to be heard.[38] In sum, the suggestion in *McCann* that courts could appoint private interested parties as special prosecutors came at a time when it was thought that a court's power was so broad that there was no need for a prosecutor as that role is understood today.

---

[37] *Toledo* interpreted the scope of Judicial Code§ 268, 36 Stat. 1163 (1831), which empowered courts to punish contempts. The court stated that the statute "conferred no power not already granted and imposed no limitations not already existing . . . it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the constitution made and the limitations it imposed." *Toledo*, 247 U.S. at 418. At the time of *McCann*, the statute was codified as 28 U.S.C. § 285. The *Toledo* interpretation was overruled in 1941 prior to the adoption of the present contempt statute, 18 U.S.C. § 401 and Fed. R. Crim. P. 42(a). *Nye* v. *United States*, 313 U.S. 33 (1941).

[38] Significantly, although the Fifth Amendment's right against self-incrimination applied to criminal contempts, the combination of the courts' summary power and the absence of the rights to counsel and trial by jury in effect required the defendant to answer.

In the 50 years following *McCann*, the application of constitutional protections to criminal contempt proceedings and the rejection of the *Toledo Newspaper* decision have significantly limited the court's power to punish summarily indirect criminal contempt. Twelve years after *McCann* this Court recognized that the alleged contemnor is entitled to a public trial. *In re Oliver*, 333 U.S. 247 (1948). The right to an impartial tribunal also was extended to criminal contempts. *Offutt* v. *United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133 (1955). The right to counsel was extended to indigent criminal defendants in *Gideon* v. *Wainwright*, 372 U.S. 335 (1964), and in 1968 this Court ruled that the Sixth Amendment right to trial by jury applied to defendants in non-petty criminal contempt proceedings. *Bloom*, 391 U.S. 194 (1968).

Also, the scope of the statute authorizing criminal contempt proceedings has been greatly restricted following *McCann*. The broad interpretation presented in *Toledo Newspaper* was discarded in *Nye* v. *United States*, 313 U.S. 33, 47-52 (1941) which narrowly limited the conduct proscribed to "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." *Id.* at 52. *Nye* rejected the broad conception of summary contempt power upon which the *McCann* appointment language was based. Indeed, the dissent in *Nye* stated that the majority's decision in effect overturned a line of cases, one of which was *McCann*. *Id.* at 55 (Stone, J., dissenting). The same year witnessed the application of the First Amendment to bar punishment for a broad category of out-of-court conduct. *Bridges* v. *California*, 314 U.S. 252 (1941). Lastly, it should be noted that the theoretical underpinning of a court's power to summarily punish indirect criminal contempt has been questioned.[39]

---

[39] The belief that courts had broad powers to summarily punish contempt was based on, first, a long standing common law practice in England and, second, on the necessary power inherent in courts to enforce their orders and protect their dignity. *In re Debs*, 158 U.S. 564, 595 (1894); 4 Blackstone Commentaries, 283-88. The first so-called justification was disproven by

C. Fed. R. Crim. P. 42(b) Does Not Permit The Appointment Of Private Interested Parties To Exercise The Investigatory Power Of The United States Attorney

There is a vast difference between allowing an attorney to notify the court of a violation and empowering an attorney to wield a government prosecutor's investigatory powers. The Second Circuit was mistaken in stating that Rule 42(b) uses the term "to prosecute" (Pet. App. A-12), and also in error in deriving therefrom the authority to grant private attorneys investigative powers. The Second Circuit's other grounds for giving its approval for such a practice do not indicate the source of this power except by a negative inference. Relying on defendants' "failure to cite any cases in which Rule 42 has been construed to limit the [investigatory] powers of the special prosecutor," the court held that "[t]he special prosecutor should have the same power to gather evidence and present that evidence as does any other government prosecutor" (Pet. App. A-11).

The Second Circuit's decision was incorrect, for it would permit *any* attorney to prosecute a criminal contempt proceeding related to *any* court order, and to exercise the full investigatory powers of the Executive Branch. Thus, special

several commentators. J. Fox, The History of Contempt of Court, (1927). Frankfurter & Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1042-1052 (1924); C. Thomas, Problems of Contempt of Court, A Study of Law and Public Policy, 4-11 (1934). Fox established that Blackstone's statement that summary proceedings were based on "immemorial usage" lacked historical foundation. Rather, only the infamous Star Chamber exercised summary process, and it was not until the mid-to late seventeenth century that other English courts, without proper legal precedent, began to claim the power to summarily punish contempt. The second justification put forth in *Debs* was limited to non-petty criminal contempts in *Bloom*, 391 U.S. 194. The absence of the full complement of procedural protections in contempt prosecutions could not "be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court." *Id.* at 208.

prosecutors could convene grand juries,[40] subpoena witnesses and documents to the grand jury, apply for and execute search, arrest and wiretap warrants, and enter formal and informal plea and immunity agreements.[41] Such far reaching consequences were neither foreseen nor intended by the drafters of Rule 42(b).

This easy transition from appointing a special prosecutor to appointing a special investigator would have to be resisted even if Rule 42(b) actually did grant courts the power to make special prosecutors out of private attorneys. The private attorney who is empowered to conduct the prosecutorial side of court proceedings when in the presence of the court is at least subject to its supervision. The private attorney armed with the resources of law enforcement is a far less controllable creature. The result of such a lack of effective oversight is well demonstrated in this case in which, as Circuit Judge Oakes pointed out, the investigation may have caused the violation. (Pet. App. A-23) (Oakes, J., dissenting)

Finally, since Rule 42(b) does not authorize the appointment of private attorneys to prosecute criminal contempts, then *a fortiori* it does not support the Second Circuit's approval of the District Court's decision to bestow full investigatory powers upon such private attorneys.

[40] Criminal contempts can be prosecuted by indictment. *United States* v. *Mensik*, 440 F.2d 1232, 1234 (4th Cir. 1971).

[41] Given the Second Circuit's broad construction of a special prosecutor's powers and the claim by Bainton that a "massive international conspiracy" was the target of the investigation, it does not take a very fertile imagination to picture how an untrained special prosecutor could compromise the United States Attorney's prerogatives to prosecute and enter into plea agreements. *See* Letters to O'Neil dated September 10 and September 11, 1984 (L. 36, 39). In fact, Bainton as Special Prosecutor purported to "bind[]. . . the Government" by granting immunity to Rochman for criminal contempts resulting from all known or unknown violations of Vuitton's trademark rights (J.A. 105) despite the obvious fact that his appointment extended only to the specific allegations contained in the application to be appointed Special Prosecutor approved by the court.

D. Rule 42(b) Cannot—Consistent With The Constitutional Doctrine Of Separation Of Powers—Be Interpreted To Permit Appointment Of An Interested Private Attorney To Prosecute A Criminal Contempt.

This Court recently noted that the Constitution mandates a tripartite division of the Federal Government's powers. *INS* v. *Chadha*, 462 U.S. 919, 951 (1983); *Bowsher* v. *Synar*, 106 S.Ct. 3181 (1986). The framers intended the three branches of government to be "largely separate from one another." *Buckley* v. *Valeo*, 424 U.S. 1,120 (1976). Separation of powers rises to the level of constitutional importance because it operates as a vital check against tyranny. *Buckley*, 424 U.S. at 121. However, the concept is not inflexible. The Constitution did not create three watertight compartments, *Buckley* at 121, because the "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a nation capable of governing itself effectively." *Id.* at 121. In the words of Justice Jackson, the Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 625 (1952) (Jackson, J., concurring). This Court has recommended a "pragmatic, flexible approach" to the resolution of disputes among the branches. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442 (1977).

The Constitution vests the power to prosecute criminal offenses in the Executive Branch, by reserving the executive power to the President, Article II, section 1, and by imposing on the President the duty to "take care that the laws be faithfully executed." Article II, section 3. This Court has said that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall) 454 (1869)). The Fifth Circuit viewed judicial interference with discretionary power to prosecute as violative of separation of powers, *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965), and

concluded that the judiciary is without the power to compel the prosecution of any criminal offense. *Smith* v. *United States*, 375 F.2d 243 (5th Cir. 1967).

Article III, section 2 carefully circumscribes the judicial power by providing for federal courts of limited jurisdiction. The Constitution creates a Supreme Court but leaves the creation of the inferior courts to the discretion of Congress, Article III, section 1. James Madison explained why the judicial power needed to be carefully controlled:

> Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.* Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*

The Federalist No. 47 (J. Madison) (*quoted in Buckley*, 424 U.S. at 120 (emphasis in original)). Furthermore, Madison strongly advocated a system of checks and balances in the form of divided offices and functions to assure that "each [branch] may be a check on the other." Federalist No. 51 (*quoted in Buckley*, 424 U.S. at 123.)

Contempt is an area of the law in which a court wields enormous power and in which legislative participation is minimal. 18 U.S.C. §401 demonstrates this minimal involvement, for it does not specify what conduct constitutes contempt. Rather, it empowers a court to punish "disobedience or resistance to its lawful writ, process, order, rule, decree, or command". 18 U.S.C. §401 (3) (1982). Madison's warning regarding an unbridled judiciary and the absence of checks and balances is borne out by the history of this case. Here, Bainton drafted the injunction which, after its approval by the court, became the equivalent of a statute against which defendants' conduct was measured. There was no participation by the executive or the legislature as a practical matter.

The absence of participation by the executive and legislature violates the principle of separation of powers by assuming

powers reserved for co-equal departments.[42] In sum, the law has been judicially created, investigated and prosecuted almost totally within the judicial branch.[43]

---

[42] Congress has empowered the judiciary to appoint counsel to prosecute crimes in the Ethics in Government Act, 28 U.S.C. § 591 et seq. (1982). It mandates a procedure for the investigation and prosecution of a designated class of Federal officials. The Attorney General is directed to apply to the court to appoint independent counsel whenever he determines that investigation "by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c). The Act is consistent with the "flexible" notion of separation of powers expressed in *Buckley*, 424 U.S. at 121, because when a conflict of interest arises within the executive department it can turn to a co-equal department. The Act permits the judiciary to step in and temporarily exercise certain executive powers until the emergency is resolved.

28 U.S.C. § 546 permits court appointment of a temporary United States attorney when that office becomes vacant. This provision has been held not to violate the separation of powers doctrine. *United States* v. *Solomon*, 216 F. Supp. 835, 840 (S.D.N.Y. 1963). Research has not revealed the precise rationale for this provision. However, it was enacted in its original form in 1863, 12 Stat. 768 (1863), and it reflected a pragmatic response to the communication problems of the era. The temporary appointment of a prosecuting attorney by the local court would avoid a total stoppage of the court's work, which would result if the court needed to await a new presidential appointee. This hypothesis is supported by the original provision's inclusion in an omnibus act entitled "An Act to Give Greater Efficiency to the Judicial System of the United States." Furthermore, it was quickly established that the authority vested in the courts to fill temporarily the vacancy lasted only until the President acted, and no longer. *In re Farrow and Bigby*, 3 F. 112, (Ga. 1880); *see also In re Yancey*, 28 F. 45 (C.C. Tenn. 1886).

[43] It could be argued that the notion of a court which does not have the power to determine for itself when to cite for contempt is itself antithetical to the separation of powers in that it would be unconstitutional for the judiciary to have to rely on the executive's whim in order to function. Although the notion is valid with respect to direct contempts, Fed. R. Crim. P. 42(a), where the conduct is so disruptive as to prevent the actual functioning of the court, it is not valid with respect to indirect contempts. In indirect contempts the court's interest is the same as in any other criminal case. *United States* v. *Shipp*, 203 U.S. 563, 574 (1906). (Indirect contempts do not prevent the actual functioning of the court) (Holmes, J.). See Note, *The Story of a Notion in the Law of Criminal Contempt*, 41 Harv. L. Rev. 51 (1927). Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 Mich. L. Rev. 483 (1975).

IV. THE SENTENCES IMPOSED ON THE PETITIONERS WERE EXCESSIVE, BASED ON IMPROPER CONSIDERATONS, AND DISPROPORTIONATE.

Courts have a special duty to exercise the contempt power with responsibility and circumspection, particularly since Congress has not seen fit to impose limitations on sentence. *Green* v. *United States*, 356 U.S. 165, 188 (1958). *See also United States* v. *Gracia*, 755 F.2d 984, 988-89 (2d Cir. 1985). It is also well settled that federal appellate courts have the power "to revise sentences in contempt cases." *Cheff* v. *Schnackenberg*, 384 U.S. 373, 382 (1966); *see also Gracia*, 755 F.2d 984. More importantly "[p]unishment of criminal contempt should reflect the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

In criminal contempt cases, courts should consider the interest of the public in having judicial decrees obeyed. *See Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). The district court erred in basing defendants' sentences primarily on "the rights of trademark holders," thus vindicating private interests (R. 240). The central question should have been, what punishment was necessary to promote proper respect for and compliance with judicial processes? Considering possible damage to Vuitton's interests resulted in the petitioners' excessive sentences.

The sentences were disproportionate both to the degree of the defendants' culpability and to the nature of the criminal contempt of which they stand convicted. The Eighth Amendment of the United States Constitution prohibits the imposition of cruel or unusual punishments and requires that any sentence imposed be proportionate to the crime committed, *Solem* v. *Helm*, 463 U.S. 277, 284 (1983), and to "sentences imposed on similarly situated defendants convicted of the same offense." *Gracia*, 755 F.2d at 989.

Despite Judge Oakes' observation that no violation would have occurred but for the misrepresentations and inducements

offered by Weinberg (Pet. App. A-23), the Second Circuit affirmed the imposition of what the trial court termed the maximum sentence possible[44]—five years—on Klayminc, whom the Court considered "the principal malefactor" (R. 241). The other defendants were sentenced "proportionately". Each of the petitioners sentences is excessive because Klayminc's "benchmark" sentence was excessive and because two other equally culpable defendants, Rochman and Pariseault, both received probation.

Also, the court below did not fully consider mitigating factors for each defendant. For a thorough report of each defendant's background, the Court is respectfully referred to the presentence reports, which accompany the record from the court below.

In summary, the Court should review these factors and impose a more appropriately tailored sentence in relation to the culpability of the defendants.

---

[44] The District Court said that *United States* v. *Gracia*, 755 F.2d 984 (2d Cir. 1985) set a limit on criminal contempt sentences of five years. In fact, neither *Gracia* nor the statute fix a maximum sentence.

The Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320 (1984), provides a maximum penalty of five years for the intentional trafficking or the attempt to so traffic such goods.

CONCLUSION

The decision of the Second Circuit should be reversed and the Order to Show Cause dismissed.

Respectfully submitted,

WILLIAM WEININGER
845 Third Avenue
New York, NY 10022
(212) 308-3767
Counsel for Petitioner
Sol Klayminc

THOMAS R. MATARAZZO
4009 Fifth Avenue
Brooklyn, NY 11232
(718) 853-4040
Counsel for Petitioner
Nathan Helfand

MITCHEL B. CRANER
666 Fifth Avenue
13th Floor
New York, NY 10103
(212) 757-9350
Counsel for Petitioner
George Cariste

JAMES A. COHEN, ESQ.
WASHINGTON SQUARE LEGAL SERVICES, INC.
715 Broadway, 4th Floor
New York, NY 10003
(212) 505-7400
Counsel for Petitioner
Barry Dean Klayminc
On the Brief:
GAIL HEATHERLY
STUART B. KATZ
JOHN O'HALLORAN
JOHN SIPOS
Legal Interns.

LEONARD J. COMDEN
WASSERMAN, COMDEN & CASSELMAN
5567 Reseda Blvd.
Suite 330
Tarzana, CA 91356
(818) 705-6800
Counsel for Petitioner
Gerald Young